



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 14, 1999

Russell V. Randle
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037

RE: Collierville Superfund Site; Agreement for Recovery of Future Response Costs

Dear Mr. Randle:

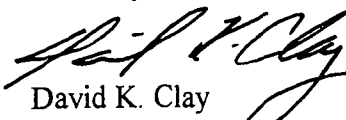
Enclosed please find a DRAFT cost recovery agreement for your client's review. As we have discussed, it is necessary to have a consent order in place to resolve Carrier's alleged civil liability for future response costs at the Collierville Site. This agreement will allow Carrier and EPA to resolve future cost issues without recourse to litigation. Please provide me with any comments on the agreement.

I will be forwarding under separate cover, after the first of the year, an estimate of what EPA projects future costs will be at the Site. This estimate will be provided as a courtesy to Carrier and is in no way binding. The remedial project manager is preparing this projection to cover costs through 2015.

Finally, EPA is still in the process of certifying a cost package for Carrier to provide documentation on all unreimbursed past costs at the Site. That documentation will also be available after the first of the year.

Thank you for your assistance.

Sincerely,


David K. Clay
Senior Attorney

enclosure



10626178

IN THE MATTER OF:

CARRIER AIR CONDITIONING
SUPERFUND SITE, COLLIERVILLE,
TENNESSEE

CARRIER CORPORATION
Settling Party

) AGREEMENT FOR RECOVERY
) OF FUTURE RESPONSE COSTS
)
) U.S. EPA Region 4
) CERCLA Docket No. ____
)
)
) PROCEEDING UNDER SECTION
) 122(h)(1) OF CERCLA
) 42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 6922(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to the Director, Waste Management Division.

2. This Agreement is made and entered into by EPA and Carrier Corporation (Settling Party). Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. On February 11, 1993, EPA issued a Unilateral Administrative Order (UAO) for the Remedial Design and Remedial Action (RD/RA) of the Carrier Air Conditioning Superfund Site (the "Site") to the Carrier Corporation.

4. Settling Party is financing and conducting the RD/RA.

5. In performing response actions at the Site, including oversight of the RD/RA, EPA incurs response costs at or in connection with the Site.

6. Settling Party has paid EPA's response costs incurred at the Site from xxx xx, 19xx, through xxx xx, 19xx, in the amount of \$xxx.

7. EPA and Settling Party desire to resolve Settling Party's alleged civil liability for Future Response Costs, as such terms are hereinafter defined, without litigation and without admission or adjudication of any issue of fact or law.

8. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for response costs incurred at or in connection with the Site.

III. PARTIES BOUND

9. This Agreement shall be binding upon EPA and upon Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Party including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.
- b. "Agreement" shall mean this Agreement. In the event of conflict between this Agreement and any appendix, the Agreement shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- e. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).
- f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.
- g. "Parties" shall mean EPA and the Settling Party.
- h. "Future Response Costs" shall mean all costs, including, but not limited to,

direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, work and other items pursuant to the UAO, SOW and this Agreement, or otherwise implementing, overseeing, or enforcing the UAO, SOW and this Agreement, including, but not limited to, payroll costs, contractor costs, travel costs, and laboratory costs. Future Response Costs shall also include all Interim Response Costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between xxx xx, 19xx and the effective date of this Agreement, or (b) incurred prior to the effective date of this Agreement but paid after that date.

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

11. Settling Party shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs. During each fiscal year, EPA will submit to the Settling Party an accounting of all response and oversight costs incurred by the U.S. Government with respect to the UAO and this Agreement. The Settling Party will, within 30 calendar days of receipt of that accounting, remit a check for the amount of those costs made payable to the "Hazardous Substance Superfund." Interest shall begin to accrue from that date. Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number, and the EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency
Region 4
Superfund Accounting
P.O. Box 100142
Atlanta, Georgia 30384

12. At the time of payment, Settling Party shall send notice that such payment has been made to:

Ms. Paula V. Batchelor
U.S. EPA, Region 4
Waste Management Division
Program Services Branch
61 Forsyth St., S.W.
Atlanta, Georgia 30303-3104

Failure to submit an accounting in one fiscal year does not prevent EPA from submitting an accounting for that year in a subsequent fiscal year.

13. Settling Party may contest payment of Future Response Costs if Settling Party determines that EPA has made an accounting error or has included costs outside the scope of this Agreement. If Settling Party believes it has a valid basis pursuant to this Agreement to contest payment of Future Response Costs then the Settling Party shall notify EPA's Project Coordinator as identified in the UAO in writing of its objections within 14 calendar days after receipt of the bill. Settling Party's written objections shall identify the disputed costs and the basis for the objection. The objections will be subject to the dispute resolution process set forth in Section VI (Dispute Resolution).

14. In the event of an objection, the Settling Party shall, within the 30 day period, pay all uncontested Future Response Costs to the EPA in the manner described in Paragraphs 11 and 12. Simultaneously, the Settling Party shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Tennessee and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Party shall send to the EPA, as provided in Section XIII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Party shall initiate the Dispute Resolution procedures in Paragraph 17. If the EPA prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Party shall pay the sums due (with accrued interest) to the EPA in the manner described in Paragraphs 11 and 12. If the Settling Party prevails concerning any aspect of the contested costs, the Settling Party shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the EPA in the manner described in Paragraph 11; Settling Party shall be disbursed any balance of the escrow account.

15. EPA reserves the right to bring an action against the Settling Party pursuant to Section 107 of CERCLA to enforce this Agreement and to collect stipulated and/or statutory penalties assessed pursuant to Section VIII of this Agreement.

VI. DISPUTE RESOLUTION

16. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Agreement. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Party that have not been disputed in accordance with this Section.

17. Any dispute which arises pursuant to Paragraph 13 of this Agreement shall, in the first instance, be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the Parties. The dispute shall be considered to have arisen when EPA receives Settling Party's written objections as set forth in Paragraphs 13.

18. In the event that the Parties cannot resolve the dispute by informal negotiations under the preceding Paragraph, the EPA Waste Management Division Director shall provide a written statement of the decision and the reasons supporting that decision to Settling Party. The Division Director's determination is EPA's final decision. If Settling Party does not agree to abide by the determination of EPA's Division Director, EPA reserves the right to seek appropriate relief.

19. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Agreement, the UAO or SOW, not directly in dispute, unless EPA agrees otherwise.

VII. UAO

20. Appendix 1 to this Agreement is the Unilateral Administrative Order (UAO) and Scope of Work (SOW) for response work, dated February 11, 1993, which directs Settling Party to develop the Remedial Design (RD) for the remedy described in the Record of Decision (ROD), dated September 3, 1992, for the Site and to implement the Remedial Design by performing certain response actions, including the Remedial Action (RA), Operation and Maintenance and Performance Monitoring.

21. The UAO and the SOW incorporated therein, set forth the major tasks that must be completed by the Settling Party to implement and complete the remedy selected in the ROD. By signature on this Agreement, the Settling Party hereby agrees not to contest their obligation to complete the work required by the SOW incorporated in the UAO. The Settling Party also acknowledges and agrees that the UAO, including the SOW, remain independently enforceable pursuant to applicable provisions of 42 U.S.C. § 9606 and § 9607(c)(3) of CERCLA.

VIII. FAILURE TO COMPLY WITH AGREEMENT

22. In the event that payments required by Paragraph 11 are not made when due, Interest shall accrue on the unpaid balance through the date of payment.

23. If any amounts due to EPA under Paragraph 11 are not paid by the required date, Settling Party shall pay to EPA, in addition to the Interest required in Paragraph 24, as a stipulated penalty, \$1,000 per violation per day that such payment is late.

24. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 11 and 12.

25. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due, and shall continue

to accrue through the date of payment.

26. Stipulated Penalties, with respect to a disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute as provided in Section VI (Dispute Resolution). Notwithstanding the stay of penalties, stipulated penalties shall accrue from the first day of non-compliance. In the event that the Settling Party does not prevail in the dispute, stipulated penalties shall be assessed and paid pursuant to Paragraphs 11 and 12.

27. In addition to the Interest and Stipulated Penalty payments required by this Section, and any other remedies or sanctions available to EPA by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with any term or condition of this Agreement, Settling Party shall be subject to an enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

28. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement.

IX. COVENANT NOT TO SUE BY EPA

29. Except as specifically provided in Paragraph 30 (Reservations of Rights by EPA), EPA covenants not to sue Settling Party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Future Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Reimbursement of Response Costs) and Section VIII, Paragraphs 22 (Interest on Late Payments) and 23 (Stipulated Penalties for Late Payments). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of their obligations under this Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

X. RESERVATIONS OF RIGHTS BY EPA

30. The covenant not to sue by EPA set forth in Paragraph 29 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all other matters, including but not limited to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Future Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606 and 9607(c)(3);

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

31. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

XI. COVENANT NOT TO SUE BY SETTLING PARTY

32. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site, including but not limited to any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to response costs incurred by Settling Party.

33. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

34. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA and Settling Party each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

35. EPA and Settling Party agree that the actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability by Settling Party. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

36. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Future Response Costs.

37. Settling Party agrees that with respect to any suit or claim for contribution brought

by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

38. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 29.

XIII. NOTICES AND SUBMISSIONS

39. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

David K. Clay
Associate Regional Counsel
U.S. Environmental Protection Agency
Environmental Accountability Division
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960

As to Settling Party:

XXX
Carrier Corporation
XXX

XIV. INTEGRATION/APPENDICES

40. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendix is attached to this Agreement: Appendix 1 is the Unilateral Administrative Order dated, March 4, 1992, and the Scope of Work incorporated in the UAO.

XV. PUBLIC COMMENT

41. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XVI. EFFECTIVE DATE

42. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 41 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: _____
Richard Green
Director
Waste Management Division
Region 4

_____ [Date]

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of
Recovery of Past and Future Response Costs, relating to the Carrier Air Conditioning
Superfund Site, Collierville, Tennessee:

FOR SETTLING PARTY: _____

[Name]

[Address]

By: _____

[Name]

[Date]